

Application Serial No.: 10/044,915

Attorney Docket No. 042846-0312870

In Response to Office Action mailed November 2, 2005

### REMARKS

In response to the 11/2/2005 Office Action, claims 1, 3-6, 8-13, 16, and 18-21 have been amended. No claims have been cancelled or added. Therefore, claims 1-21 are pending. Support for the instant amendments is provided throughout the as-filed Specification. Thus, no new matter has been added. In view of the foregoing amendments and following comments, allowance of all the claims pending in the application is respectfully requested.

### REJECTIONS UNDER 35 U.S.C. § 102

Claims 1, 3-5, 7, 8, 10-12, and 14 stand rejected under 35 U.S.C. § 102(e) as allegedly being anticipated by U.S. Patent No. 6,678,888 to Sakanishi (hereinafter "Sakanishi"). Applicant disagrees with these rejections, but in an effort to expedite prosecution Applicant has amended selected ones of the claims to clarify one or more of the differences between Sakanishi and the claimed invention. In light of the amendments presented above, the rejection of these claims based on Sakanishi should be withdrawn at least because Sakanishi does not disclose each and every feature of the claimed invention.

For example, claim 1 has been amended to recite *inter alia* "means for controlling the timing of the installation of the update based on one or more installation criteria, the installation criteria comprising the determined priority associated with the update, and a number clients that have active sessions in the one or more applications." Independent claims 3, 5, 8, 10, and 12 recite similar features, among other things.

The Examiner alleges that Sakanishi discloses determining priority levels for software updates to be installed on a server, and using the determined priority levels to decide whether

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to proceed with a given update. *See* the 11/2/2005 Office Action at page 3. Even if this were true, Sakanishi would still not read on the claimed feature because the priorities levels assigned to software in Sakanishi are used to resolve situations where an update may interfere with the operation of software already being implemented on a processing system. *See* Sakanishi at, *e.g.*, col. 3, lines 25-35. Therefore, the priorities of Sakanishi are not used in conjunction with a number clients that have active sessions in the one or more applications being updated and/or other installation criteria to control the timing of the update, as is required by the claim. Additionally, Sakanishi appears to disclose either installing or not installing an update, but does not describe controlling a timing of an update based on a priority of the update and other installation criteria. For at least this reason, the rejection of independent claims 1, 3, 5, 8, 10, and 12 based on Sakanishi should be withdrawn. Further, claims 4, 7, 11, and 14 depend from and add features to independent claims 3, 5, 10, and 12, respectively. Accordingly, claims 4, 7, 11, and 14 are allowable over the cited reference based on their dependency as well as for the features that they add to the independent claims.

#### **REJECTIONS UNDER 35 U.S.C. § 103**

Claims 2, 6, 9, 13, 15, and 17 stand rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Sakanishi in view of U.S. Patent Application Publication No. 2004/0215755 to O'Neill (hereinafter "O'Neill"). Applicant disagrees with this rejection at least because (1) the cited references do not teach or suggest all of the features of the claimed invention and (2) O'Neill constitutes non-analogous art.

The Examiner admits that Sakanishi alone does not teach or suggest all of the features of claims 2, 6, 9, 13, 15, and 17, and proposes that it would have been obvious modify the

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system and method of Sakanishi in accordance with the teachings of O'Neill to provide the claimed features missing from the system and method of Sakanishi. However, O'Neill does not address the deficiency of Sakanishi described in the previous section. As a result, the combination of Sakanishi and O'Neill fails, and the rejections of these claims based on the proposed combination should be withdrawn.

Further, the rejection of claims 2, 6, 9, 13, 15, and 17 is improper because O'Neill constitutes non-analogous art with respect to the claimed invention. For example, the disclosure of O'Neill apparently relates to distributing software updates to client devices over a network. See O'Neill, e.g., at paragraphs [0013] and [0014]; and FIGS. 1A-1D. The field of invention in the instant application relates to "updating applications on a running application server." See the specification at page 1 (*emphasis added*). Due to the different considerations between updating software in client devices and updating applications on a running application server, O'Neill is non-analogous art because it is not "reasonably pertinent to the particular problem with which the inventor was involved." *Cross Medical Products, Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293 (Fed.Cir. 2005)(*citation omitted*)(hereinafter "*Cross Medical*"). For at least this reason, the rejection of claims 2, 6, 9, 13, 15, and 17 is improper and should be withdrawn.

Claim 16 stands rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Sakanishi. Applicant disagrees with this rejection at least on the grounds that (1) Sakanishi does not teach or suggest all of the features of the claimed invention and (2) the Official Notice taken by the Examiner is improper.

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As has been set forth above, Sakanishi is deficient with respect to independent claim

1. The Official Notice taken by the Examiner does not address at least the particular deficiency pointed out in the previous section. Therefore, claim 16 is allowable over Sakanishi based on its dependency as well as for the features that it adds to claim 1.

Further, the Examiner has taken Official Notice that it was well known in the art at the time of the invention “that priorities can be based on the type of software, *i.e.* [sic] user applications, system programs, *etc.*” See the 11/2/2005 Office Action at page 8. Even if this were true, this statement would not accurately reflect the logical leap being employed by the Examiner to reject claim 16 using Official Notice. The claimed feature includes a priority of an update of an application for installation on an application server where the priority is related to an application type of the application. In view of the differences between the facts Officially Noticed by the Examiner and the claimed feature, Applicant hereby traverses the Examiner’s Official Notice. In response to this traversal, the Examiner must either provide documentation of the Officially Noticed facts, or withdraw the rejection of claim 16.

Claims 18-21 stand rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over Sakanishi in view of U.S. Patent No. 6,009,274 to Fletcher *et al.* (hereinafter “Fletcher”). Applicant disagrees with this rejection at least because (1) the cited references do not teach or suggest all of the features of the claimed invention and (2) Fletcher constitutes non-analogous art.

The Examiner admits that Sakanishi alone does not teach or suggest all of the features of claims 18-21, and proposes that it would have been obvious modify the system and method of Sakanishi in accordance with the teachings of Fletcher to provide the claimed features

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missing from the system and method of Sakanishi. However, Fletcher does not address the deficiency of Sakanishi described in the previous section. As a result, the combination of Sakanishi and O'Neill fails, and the rejections of these claims based on the proposed combination should be withdrawn.

Further, the rejection of claims 2, 6, 9, 13, 15, and 17 is improper because Fletcher constitutes non-analogous art with respect to the claimed invention. For example, the disclosure of Fletcher apparently relates to distributing software updates to end systems over a network. See Fletcher, *e.g.*, at the Abstract. The field of invention in the instant application relates to “updating applications on a running application server.” See the specification at page 1 (*emphasis added*). Due to the different considerations between updating software in end systems and updating applications on a running application server, Fletcher is non-analogous art because it is not “reasonably pertinent to the particular problem with which the inventor was involved.” *Cross Medical*. For at least this reason, the rejection of claims 18-21 is improper and should be withdrawn.

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**CONCLUSION**

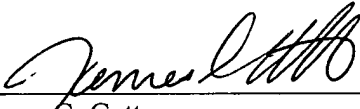
Having addressed each of the foregoing rejections, it is respectfully submitted that a full and complete response has been made to the outstanding Office Action and, as such, the application is in condition for allowance. Notice to that effect is respectfully requested.

If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at the number provided.

Date: February 2, 2006

Respectfully submitted,

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